No. 87-1938

In the Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO OPPOSITION

ROBERT S. BURK
General Counsel
HENRI F. RUSH
Deputy General Counsel
ELLEN D. HANSON
Associate General Counsel
MICHAEL L. MARTIN
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

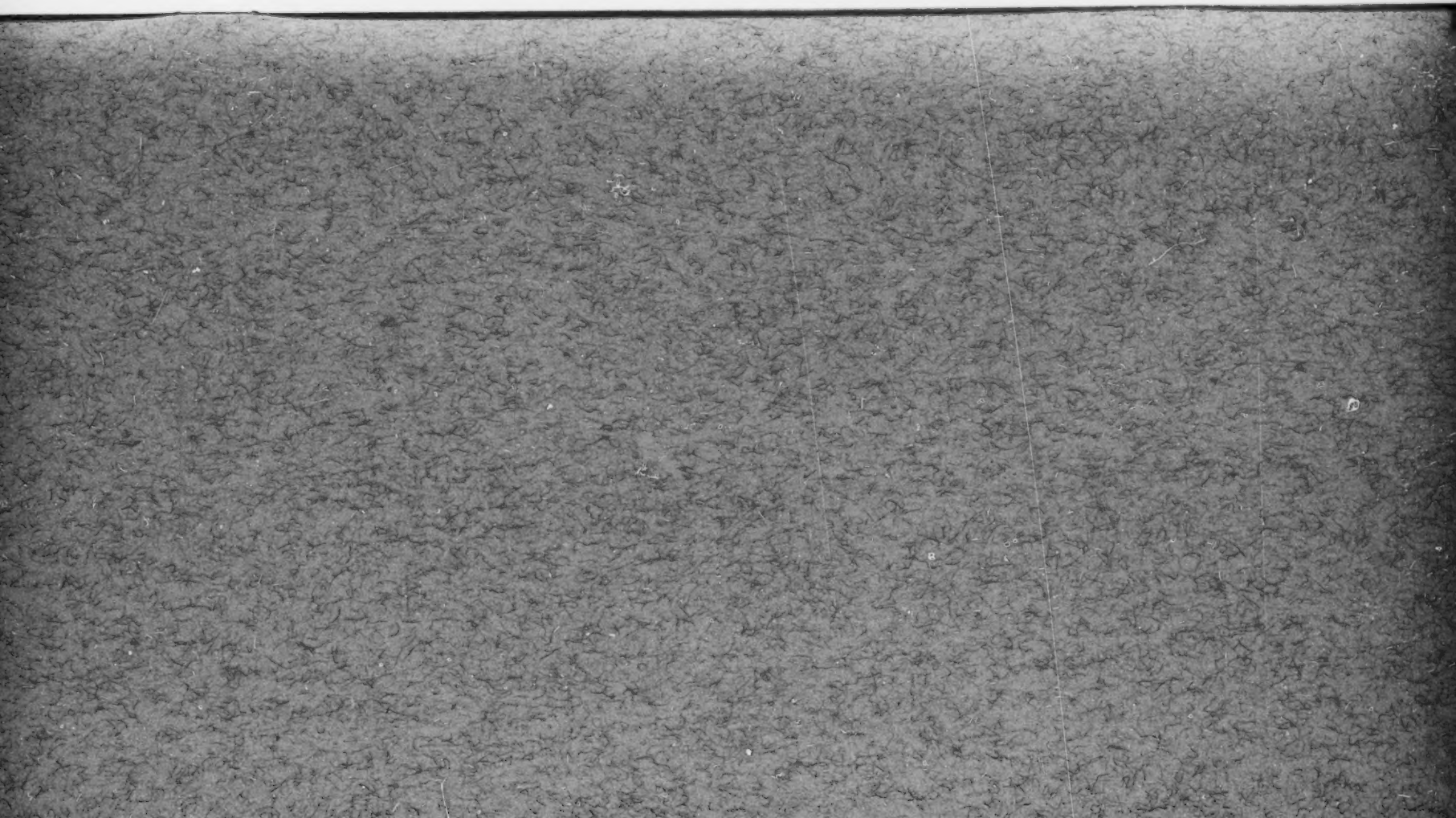

TABLE OF AUTHORITIES

Statutes: Page

Other Authorities:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1938

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO OPPOSITION

The Interstate Commerce Commission's petition seeks to have the principle of *Service Storage & Transfer Co. v. Virginia,* 359 U.S. 171 (1959) upheld and enforced by removing a State obstruction to the use of a Federal license while the scope of that license is in litigation.

The objections raised fall into five general categories. First, Texas attempts to limit *Service Storage* to transportation which is "facially interstate." Second, Texas argues that the matter is not justiciable or that the Federal courts should abstain from resolving it. Third, Texas maintains that relief under the All Writs Act is not available, while the Solicitor General asserts that relief, although appropriate, was not required.

Fourth, both the Solicitor General and Texas argue that the ICC cannot seek a writ of *certiorari* in this case. Finally, Texas and the Solicitor General both argue (for different reasons) that review at this time is not appropriate.

None of these arguments either precludes or counsels against granting the ICC's petition.

1. At the heart of the matter, Texas disputes the premise of *Service Storage*—that the ICC has primary jurisdiction to determine the transportation authorized by its certificates.

Texas would limit *Service Storage* to transportation that is "facially *inter*state." It claims that this case is "facially *intra*state" because the disputed movement does not cross State lines. But that claim *presupposes* that the disputed movement is separate from, not a continuation of, the first leg of the movement of goods involved here (which clearly crosses State lines).[1] Thus, Texas' standard for allocating primary jurisdiction between the ICC and the States is not workable; it requires a determination on the ultimate issue in dispute (and would let the State make that determination).

Here, the ICC has interpreted the reach of its license, as it has sole authority to do under *Service Storage*. The State can challenge the ICC's conclusion under the Hobbs Act, as it is currently doing before the United States Court of Appeals for the Fifth Circuit. It cannot choose to ignore the ICC's ruling and proceed with an inconsistent State enforcement action. As explained in the petition (at 6), that violates both the Supremacy and Commerce Clauses of the Constitution, as well as this Court's decision in *Service Storage*.

2. The process established by this Court in *Service Storage* warrants and requires protection by the Federal courts. The ICC exercised its declaratory order authority under 5 U.S.C. 554(e) to "terminate a controversy or remove uncertainty," which can be used in lieu of an ad-

---

[1] On the first leg, the goods are shipped from Georgia into Texas under a bill-of-lading bearing a "storage-in-transit" notation that plainly shows there will be a second leg to the move.

judication and with the same effect.[2] *See Weinberger v. Hynson, Wescott & Dunning,* 412 U.S. 609, 625-27 (1973). The ICC order in this case determined rights by declaring the lawfulness of the pattern of transportation described in it.[3] As a determination of Federal law by the appropriate Federal authority, the ICC's decision is binding on the State.[4]

There is no basis for abstention by the Federal courts here. The States have no legitimate role in determining the scope of a Federal license.[5] *See Service Storage, supra.*

---

[2] Contrary to Texas' suggestion (Opp. at 25), such a ruling is fully reviewable by the Federal courts. *Frozen Food Express v. United States,* 351 U.S. 40, 45 (1956).

City of Miami v. ICC, 669 F.2d 219 (5th Cir. B 1982) ruled on the finality of a particular ICC order and "should not be read as . . . suggest[ing] that an ICC declaratory order is never reviewable . . . ."669 F.2d at 222. The other cases cited by Texas either did not involve a declaratory order, *United States v. Los Angeles R.R.,* 273 U.S. 299 (1927), or were found to be final and reviewable, *Marine Terminal v. Rederi. Transatlantic,* 400 U.S. 62 (1970).

[3] Texas wrongly characterizes the ICC's decision as purely advisory (Opp. at 23-25). While the decision was limited in scope, it was not abstract in nature.

The ICC decisively ruled that the described pattern of transportation is authorized by the carrier's ICC license. But the ICC did not conduct a factual investigation of whether each and every movement ever conducted by the parties conformed to the pattern described.

As noted in the ICC petition (at 4, n.7), Texas can challenge (before the ICC) the *factual predicate* of the order and seek an ICC ruling that any *other* specific pattern of transportation for any particular shipments is not covered by the ICC license.

[4] *See Mississippi Power & Light Co. v. Mississippi,* __ U.S. __, 56 U.S.L.W. 4751, 4756 (June 24, 1988); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 318-19 (1981). *Compare, Pennzoil v. Texas,* __ U.S. __, 107 S.Ct. 1519 (1987) (Texas Opp. at 23), involving a Federal court's interpretation of a *State* statute.

[5] *New Orleans Public Service v. City of New Orleans,* 798 F.2d 858 (5th Cir. 1986), *cert. denied,* __ U.S. __, 107 S.Ct. 1910 (1987) (Texas

3. As recognized by the Solicitor General (U.S. Opp. at 8), an injunction under the All Writs Act (28 U.S.C. 1651) is appropriate to protect the *Service Storage* process.[6] Indeed, the primary purpose of the All Writs Act is to fill in the gaps that threaten to thwart the proper exercise of Federal court jurisdiction. *Pa. Bureau of Correction v. U.S. Marshals,* 474 U.S. 34, 41 (1985), citing *McClung v. Silliman,* 6 Wheat. 598 (1821) and *McIntire v. Wood,* 7 Cranch 504 (1813). As explained in the petition (at 8), the jurisdiction of the court of appeals embraces that of the Federal agency that issued the order under review. See 28 U.S.C. 2349. The State court should not be allowed to *usurp* Federal jurisdiction over the matter in dispute. Under the circumstances, the Federal court should not hesitate to invoke the All Writs Act.

The ICC's request was properly brought under the All Writs Act. *See FTC v. Dean Foods Co.,* 384 U.S. 597, 605 (1966). Contrary to Texas' claim (Opp. at 11), it was not a request for direct enforcement (*i.e.* execution of the terms) of an ICC order, for which an action would lie in district court under 28 U.S.C. 1336(a).[7] Indeed, the ICC decision

---

Opp. at 23) is not pertinent. That case arose in a context where "[n]o one disputes that the [City] Council can set retail rates. NOPSI only asks that the Council recognize FERC-determined costs *within the Council's rate-making proceeding.*" *Id.* at 863 n.1 (emphasis added).

Public Serv. Comm'n v. Wycoff, 344 U.S. 237 (1952) (Texas Opp. at 17) is also inapposite. There the Court found no actual controversy, a prerequisite for a declaratory judgment *by a court* under 28 U.S.C. 2201, largely because no enforcement action had been taken by the State agency.

[6] Contrary to Texas' claim (Opp. at 23, n.17), an injunction is not barred by the Anti-Injunction Act (28 U.S.C. 2283) since it is sought by a Federal agency, as the court below acknowledged (Pet. at 3a-4a). See *Leiter Mineral, Inc. v. United States,* 352 U.S. 220, 225-26 (1957).

[7] The private parties' district court action (see Pet. at 4, n.6) was brought under 28 U.S.C. 1331 (Federal question jurisdiction) and 42 U.S.C. 1983 (State actions in deprivation of Constitutional rights), *not* 28 U.S.C. 1336 (violation of an ICC order).

does not require enforcement because it does not order any action to be taken; it merely declares certain transportation to be interstate.

But even if enforcement of the ICC's order were involved, that would not preclude use of the All Writs Act here. Once the circuit court received a proper petition to review the agency's order, it obtained full jurisdiction over the case. See 28 U.S.C. 2349. It need not carve out and eschew particular aspects of the case, reserving them for separate district court consideration.[8] Moreover, since the circuit court's responsibilities extend to whether or not to suspend the ICC order (see 28 U.S.C. 2349), they necessarily encompass protection of the binding effect of an ICC order that is *not* suspended. *See Rochester Telephone Corp. v. United States,* 307 U.S. 125, 143 (1939) (a distinction between "negative" and "affirmative" orders serves no useful purpose).

As we have demonstrated (Pet. at 10, n.23), all the requirements for a preliminary injunction are met here.[9] Indeed, the Solicitor General expresses "no doubt that the court of appeals *may* provide such relief in this situation" (U.S. Opp. at 8).

---

[8] For example, even though district courts are assigned jurisdiction to review ICC orders for payment of money, under 28 U.S.C. 2321(b), circuit courts routinely hear challenges to reparation orders when the decision under review contains other forms of relief that are assigned to circuit courts for review under 28 U.S.C. 2321(a). *See, e.g., Pullman-Standard, A Div. of Pullman Inc. v. I.C.C.,* 705 F.2d 875, 880-881 (7th Cir. 1983), citing *ICC v. Atlantic Coast Line R. Co.,* 383 U.S. 576, 596-97 (1966).

[9] The courts need not conduct a "clean hands" inquiry (see Texas Opp. at 15) before affording the relief requested here. The mere *allegations* of misconduct (which we maintain are unwarranted) do not deprive the ICC's order of its normal full force and effect. There is a presumption of regularity in the official acts of public officials. *United States v. Chemical Foundation,* 272 U.S. 1, 14-15 (1926).

Acknowledging that injunctive relief would have been appropriate, the Solicitor General argues that the circuit court's exercise of discretion should not be disturbed.[10] However, the circuit court's denial here was not based upon discretionary considerations, but rests upon its failure to acknowledge the basic principle of *Service Storage* and the scope of its jurisdiction over this case. See Pet. at 5-8.

4. The Solicitor General (U.S. Opp. at 5-7) and Texas (Opp. at 7-8) argue that the ICC lacks authority to bring its petition to this Court. They rely upon *United States v. Providence Journal Co.*, 56 U.S.L.W. 4366 (May 2, 1988) for the proposition that, absent an explicit statutory exception, only the Solicitor General can represent the Federal government's interests in this Court.

As the Solicitor General (but not Texas) recognizes, the ICC may represent its own interests in Hobbs Act cases. 28 U.S.C. 2348, and may bring a petition for a writ of certiorari under 28 U.S.C. 2350 without the Solicitor General. *See also,* Stern, *"Inconsistency" in Government Litigation*, 64 HARV. L. REV. 759 (1951), cited with apparent approval in *Providence Journal,* 56 U.S.L.W. at 4370 n.9.

The Solicitor General argues, however, that the ICC, is strictly limited in its access to this Court by the express language of 28 U.S.C. 2350. Stated differently, the Solicitor General takes the position that 28 U.S.C. 1254(1), upon which the ICC based its petition, is not available to the ICC because it is an agency covered by the Hobbs Act, 28 U.S.C. Chapter 158.[11] This approach

---

[10] The Solicitor General accepts the court's explanation that its jurisdiction was not threatened, even though "that is not a necessary precondition for the requested injunction" (U.S. Opp. at 9).

[11] The Solicitor General does *not* argue that Section 1254(1) would be unavailable even to him in a Hobbs Act case. Section 1254(1) invests this Court with plenary authority to consider petitions from *any*

overlooks the reach of the special grant of independent litigating authority in Chapter 157, at 28 U.S.C. 2323, which accords separate "party" status to the ICC "as of right" in *any* action "involving the validity of [an ICC] order or requirement."

The Solicitor General's interpretation is also belied by the legislative history of the amendment bringing review of ICC orders under the Hobbs Act. ICC concerns about its historic litigating authority, and especially its authority to come before this Court, were a major consideration in Congress' debate on the legislation to substitute Hobbs Act review for review of ICC orders under the Urgent Deficiencies Act of 1913. See H.R. REP. NO. 1569, 93d Cong. 1st Sess. (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7925 (Report). See also, *Judicial Review of Decisions of the ICC: Hearing on S. 663 Before the Subcomm. on Improvements in Judicial Machinery, Comm. on the Judiciary,* 93d Cong., 1st Sess. (1973) (Hearing).

To alleviate these concerns Congress asked for and received assurances from the Department of Justice that the passage of S. 663 would not truncate the ICC's ability to participate independently in actions involving its orders. Hearing, *supra* at 32. Specifically, then Solicitor General Bork stated that "the Commission would continue to have the same authority to represent itself independently in the Supreme Court under S. 663 that it now has under the Urgent Deficiencies Act. That authority includes the right to file petitions for certiorari and to oppose such petitions when filed against it." Report, *supra* at 10-12.

The Senate Committee stated that it agreed with the Solicitor General that the ICC would continue to be able to present its views independently and "intends that the bill

---

party to *any* civil case, *before* or after rendition of judgment. Other statutory provisions for review on certiorari "merely overlap § 1254(1) without in any way detracting from it." Stern, Gressman and Shapiro, *Supreme Court Practice* 40 (6th ed. 1986).

have this effect." S. REP. NO. 500, 93d Cong., 1st Sess. 7 (1973). The House Committee, after restating the ICC's concerns, stated even more emphatically (Report, *supra* at 9):

> Objectively, it is difficult to perceive what more the Congress may do legislatively to protect the rights of the ICC and aggrieved parties to be shielded from caprice without squandering the primary intent of this legislation. The ICC may still intervene at any level as a matter of right and be represented by its counsel; the Attorney General may not terminate a proceeding over their objection; they may initiate, take part in or continue proceedings without regard to the action or inaction of the Attorney General; and they may file a petition for a writ of certiorari if they so choose. 28 U.S.C. §§ 2348, 2350. The intent and meaning of the provisions could not be stated with more clarity; the Committee is compelled to conclude that any such activity on the part of the Attorney General, resulting in an abridgement of any of those statutorily-conferred rights and whether witting or unwitting, would be subject to challenge in court. Moreover, the ICC has twice received the assurance of the Department, through the Solicitor General and the Assistant Attorney General for Legislative Affairs (see Letters attached to this Report), that the independence of the Commission with respect to its ability to participate fully and equally in all proceedings affecting its interests will not be tampered with in any respect.

5. Review now is not only appropriate but imperative, and as pointed out in our petition (at 9 n.20) ultimately will save this Court's time by obviating future petitions.

Contrary to Texas' assertion (opp. at 8-10), the controversy now before the Fifth Circuit is wholly separate. The Fifth Circuit is considering whether the ICC properly determined that the movements at issue are part of inter-

state transportation. The controversy *here* is limited to whether the carrier can exercise its Federal license (in the manner permitted by the ICC) *during litigation*. This issue does not depend in any way upon whether the transportation is ultimately ruled to be inter- or intrastate.[12]

The Fifth Circuit has made its final ruling on the issue presented here, and has given no indication that it might revisit the matter. Indeed, the court stated that even *if* it had already affirmed the ICC's decision, it would not be compelled to enjoin the State prosecution. See Pet. at 4a. Thus, there is no reason to await a further decision by the Fifth Circuit before resolving the controversy presented here.[13] Moreover, given the element of timing in the issue presented (*i.e.* whether the ICC decision is binding upon the States *during litigation*), there must be immediate (interlocutory) review to afford effective relief.

As shown in the ICC's petition (at 9-10), this matter clearly meets the criteria for interlocutory review. The Solicitor General suggests that the ICC has other

---

[12] One issue in common is Texas' challenge to the ICC's primary jurisdiction. This Court need not await a circuit court ruling on that issue. The ICC's primary jurisdiction is well-established by the controlling precedent of this Court.

[13] The Fifth Circuit's decision will not necessarily resolve this dispute. If it affirms the ICC, there is no reason to believe that the State court injunction would immediately be lifted, particularly if Texas seeks further review. Nor is there any reason to believe that the Fifth Circuit would then enjoin the State court action, given the court's statement that an affirmance would not compel an injunction.

If, on the other hand, the Court of Appeals should find the ICC's procedures and/or analysis flawed, it would remand the case to the agency. It could then be several more years before a new ICC decision could be issued and any court review of it completed.

Even if the Fifth Circuit were to conclude that the transportation *could not* be part of interstate transportation, the issue presented here would not be rendered moot. Otherwise, this important issue, which is clearly capable of repetition (see Pet. at 7-8, n.16), could evade review.

remedies, *viz.* continued appeals to the same three forums (Texas court system, Federal district court and Fifth Circuit) that have already declined to acknowledge and/or enforce the *Service Storage* principle in this case. Such remedies are wholly illusory and to suggest pursuing them ignores the crucial timing element in the issue presented. Thus, the Court can and should review this matter now.

CONCLUSION

In sum, the ICC's petition is proper and presents a compelling case for review and immediate correction. The ICC again urges the Court to grant its petition for a writ of certiorari and, because the decision below is so clearly at odds with *Service Storage,* summarily reverse the lower court's denial of preliminary injunction.

Respectfully submitted,

ROBERT S. BURK
General Counsel
HENRI F. RUSH
Deputy General Counsel
ELLEN D. HANSON
Associate General Counsel
MICHAEL LESTER MARTIN
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

SEPTEMBER 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/62035